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IN THE
Supreme Court of the United States

OCTOBER TERM, 1993

PUD No. 1 OF JEFFERSON COUNTY
AND THE CITY OF TACOMA,

Petitioners,
v.

STATE OF WASHINGTON, DEPARTMENT OF ECOLOGY,
DEPARTMENT OF FISHERIES AND
DEPARTMENT OF WILDLIFE,

Respondents.

On Writ of Certiorari to the
Supreme Court of the State of Washington

BRIEF OF AMICI CURIAE
AMERICAN FOREST & PAPER ASSOCIATION,
AMERICAN PUBLIC POWER ASSOCIATION,
EDISON ELECTRIC INSTITUTE,
AND NATIONAL HYDROPOWER ASSOCIATION
IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Does a state's inclusion of minimum stream flows for fish habitat in a section 401 water quality certificate exceed the authority granted to the states in section 401 of the Clean Water Act and infringe on the comprehensive authority to determine non-water quality related license conditions for hydroelectric projects that Congress granted to the Federal Energy Regulatory Commission in the Federal Power Act?

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INTEREST OF AMICI CURIAE

The American Forest & Paper Association ("AFPA"), American Public Power Association ("APPA"), Edison Electric Institute ("EEI"), and National Hydropower Association ("NHA") submit this brief as *amici curiae*.¹

¹ Letters from counsel for Petitioners and Respondents consenting to the filing of this brief by *amici curiae* have been filed with this Court.

AFPA is the national trade association of the forest, pulp, paper, paperboard, and wood products industry. APPA and EEI are the national trade associations of the publicly-owned and investor-owned segments of the nation's electric utility industry. NHA is the national association of hydroelectric project owners, builders, equipment suppliers, and consultants.² Together, APPA, EEI and NHA members generate approximately 85% of all electricity in the United States and serve approximately 90% of the nation's ultimate consumers of electricity.

The issues raised in Petitioners' Brief involve the interpretation and implementation by the states of section 401 of the Clean Water Act, 33 U.S.C. § 1341 (1988) and the effect of the states' broad interpretation of section 401 on the licensing of hydroelectric projects by the Federal Energy Regulatory Commission ("FERC"). The members of the *amici* associations hold the vast majority of the more than 1,000 licenses issued by FERC for hydroelectric projects located throughout the United States. Stream flow conditions are an essential component of these licenses, directly affecting each project's energy production and cost and other benefits created by the project. Expansion of state regulation of stream flows at hydroelectric projects pursuant to the Clean Water Act will have an extensive impact on the members of AFPA, APPA, EEI, and NHA and on the development and continued reliance on hydroelectric generating projects throughout the country.

Furthermore, the issues in this proceeding have national implications. FERC-licensed and other federal and non-federal hydropower projects represent a significant part of America's present energy supply, providing nearly 90,000 megawatts of electricity totaling approximately

² The particular interest of each association is more fully described in the Appendix. (A. 1a-2a).

12% of the electric capacity in the United States.³ Over 150 million consumers in 48 states, including residential, agricultural, commercial and industrial customers, benefit from the power generated by hydroelectric facilities.⁴ The long, useful life of hydroelectric facilities and their relatively low operating and maintenance costs place hydroelectric power among the least expensive sources of electricity, a benefit that inures directly to electricity consumers.⁵ In addition, hydropower is the nation's preeminent renewable energy resource, accounting for 83% of the clean, renewable energy on which the country relies.⁶

Under authority granted by Congress to FERC in the Federal Power Act,⁷ FERC establishes license conditions for projects pursuant to its jurisdiction to protect and reconcile competing water use demands, such as fish and wildlife habitat, aesthetics, recreation, navigation, water quality, water supply, generating capacity and energy output. The Federal Power Act requires FERC to give equal consideration to power and non-power values in licensing and relicensing hydroelectric projects. By balancing all of these considerations and tailoring appropriate license terms and conditions, FERC ensures that the public interest, as a whole, is served.

In contrast, state water quality agencies have a substantially narrower perspective and role in the licensing of hydroelectric projects. Through an overbroad reading of section 401 of the Clean Water Act, the state water

³ Edison Electric Inst., *Statistical Yearbook of the Electric Utility Industry/1991*, No. 59, Table 2, p. 8 (EEI, Washington, D.C., 1992).

⁴ National Hydropower Association, *Hydro Guide: Hydroelectric Resources of the United States*, "Introduction" (NHA, Washington, D.C. 1989).

⁵ *Id.*

⁶ Richard T. Hunt and Judith Mohsberg Hunt, *How Does Hydropower Compare With Other Renewables?* 7 (1993).

⁷ Codified in various sections of 16 U.S.C. §§ 791a-825r (1988 & Supp. 1992).

quality agency in this proceeding is seeking to usurp FERC's authority over the licensing process, inhibiting FERC's ability to weigh power and non-power values and to formulate terms and conditions in licenses for both new and existing hydroelectric projects.

As the national voices for all sectors of the hydropower industry, *amici* are vitally interested in a proper, harmonious and consistent interpretation and application of federal statutes affecting the development of hydroelectric power. Such interpretation and application are necessary to ensure that hydroelectric projects are licensed in a manner that best serves the public interest.

SUMMARY OF ARGUMENT

In its decision below, the Washington Supreme Court upheld the conditions requiring minimum stream flows prescribed by the Washington Department of Ecology in a water quality certificate that the Department issued for the Elkhorn hydroelectric project. This decision misinterprets and fails to harmonize the authority that Congress granted to the states in section 401 of the Clean Water Act with the comprehensive hydropower licensing authority that Congress granted to FERC in the Federal Power Act.

First, the Washington Supreme Court's decision improperly expands the scope of authority granted to the states in section 401 of the Clean Water Act. In upholding the conditions requiring minimum stream flows imposed by the Washington Department of Ecology on the Elkhorn Project, the Washington Supreme Court held that section 401 of the Clean Water Act grants the State of Washington the authority to impose non-water quality based minimum stream flows to protect fish habitat. The Washington Supreme Court's interpretation of the authority granted to the states in section 401 of the Clean Water Act ignores provisions of the Federal Power Act in which Congress expressly granted FERC ultimate authority over this issue and is inconsistent with this Court's opinions in

First Iowa Hydro-Electric Coop. v. FPC, 328 U.S. 152 (1946) and *California v. FERC*, 495 U.S. 490 (1990), which interpret the scope of FERC's licensing authority in relation to the state regulation of water. Moreover, the Washington Supreme Court's interpretation of the authority granted to the states in section 401 of the Clean Water Act conflicts with the express provisions of section 401.

Second, the Washington Supreme Court's decision threatens to seriously disrupt the FERC hydropower licensing process. The practical consequence of the Washington Supreme Court's decision regarding the scope of state authority under section 401 is that individual states may usurp FERC's licensing authority. Under the Washington Supreme Court's interpretation of section 401 of the Clean Water Act, a state may impose conditions requiring minimum stream flows to protect fish habitat that severely constrain FERC's ability to establish reasonable license terms and conditions that are designed to address a broader range of factors affecting the public interest. Forty-eight states now have federally licensed hydroelectric projects under FERC jurisdiction. If the Washington Supreme Court's interpretation of the scope of authority granted to the states is adopted, FERC's authority to implement a national energy policy and to control the licensing process will be severely eroded, causing uncertainty and delay in the licensing of hydroelectric projects nationwide and the potential loss of energy and other benefits from this valuable resource.

ARGUMENT

I. THE WASHINGTON SUPREME COURT'S INTERPRETATION OF THE CERTIFICATION AUTHORITY GRANTED TO THE STATES IN SECTION 401 OF THE CLEAN WATER ACT IS INCONSISTENT WITH CONGRESS' GRANT OF AUTHORITY TO FERC IN THE FEDERAL POWER ACT.

Under the Washington Supreme Court's interpretation of section 401 of the Clean Water Act, a state may impose conditions on a FERC license, such as minimum stream flows to protect fish habitat, based on any state requirement related to use of a waterway. Specifically, the Washington Supreme Court found that, pursuant to section 401 of the Clean Water Act, the Washington Department of Ecology has authority to impose conditions requiring minimum stream flows to protect fish habitat, even though those conditions are not necessary to comply with the State's applicable water quality criteria. Under the lower court's reasoning, almost any water-related requirement of state law—whether pertaining to fish, wildlife, recreation, navigation or other non-water quality matters—can be imposed as a condition in a section 401 certificate. Congress did not intend for section 401 to apply so expansively.

Pursuant to the Federal Power Act, as amended in 1986 by the Electric Consumers Protection Act, Pub. L. No. 99-495, 100 Stat. 1243 (1986) ("ECPA"), FERC possesses exclusive authority to establish license conditions relating to fish and wildlife and other non-water quality matters in the exercise of its statutory obligations to consider and reconcile competing water use demands. In contrast, by allowing states to issue and condition water quality certificates for federally-licensed activities pursuant to section 401, Congress provided the states with only limited authority to impose appropriate conditions based on applicable effluent limitations, water quality standards and other provisions specified in section 401 as well as state law requirements directly relevant to

such factors. The Supreme Court of Washington's interpretation of section 401 significantly exceeds the bounds of authority granted to the states and, consequently, upsets the balance of authority that Congress has established between state water quality agencies in section 401 and the federal licensing activities of agencies such as FERC in the Federal Power Act.

A. The Washington Supreme Court's Decision Is Incompatible With The Comprehensive Hydroelectric Licensing Program Created By Congress.

In 1920 Congress established the federal licensing program for hydroelectric projects when it enacted the Federal Water Power Act, ch. 285, 41 Stat. 1063 (1920), which was incorporated into Part I of the Federal Power Act in 1935. The Federal Power Act established the former Federal Power Commission as the government agency with authority to issue licenses for most non-federal hydroelectric projects. 16 U.S.C. § 792 (1988). In 1977 the hydroelectric licensing authority held by the Federal Power Commission was transferred to FERC pursuant to the Department of Energy Organization Act. *See* 42 U.S.C. § 7151(b) (1988). FERC issues licenses not exceeding 50 years that authorize the construction, operation and maintenance of hydroelectric projects on navigable waterways or other bodies of water over which Congress has jurisdiction under its authority to regulate interstate commerce. *See* 16 U.S.C. § 797(e) (1988).

Part I of the Federal Power Act establishes the comprehensive regulatory program for hydroelectric power. Pertinent sections of Part I that demonstrate this fact include

—Sections 4(e), 10(a) and 10(j), which require FERC to determine whether and under what conditions a project will be best adapted to a comprehensive plan for use of the waterway and give equal consideration to power and certain non-power values in making that determination; and

—Section 15, which authorizes the relicensing of projects and the inclusion of terms and conditions in new licenses.

See 16 U.S.C. §§ 797(e), 803(a), 803(j), 808.

Pursuant to authority granted in the Federal Power Act, FERC must consider all factors affecting the public interest in the comprehensive development of the waterway. The comprehensive balancing authority granted to FERC under the Federal Power Act constitutes the core of the federal licensing process. Pursuant to this balancing authority, no license for a hydroelectric project shall be granted unless, in the judgment of FERC, the project is best adapted to a comprehensive plan for: (1) improving or developing a waterway for the use or benefit of commerce; (2) the improvement and utilization of water power development; (3) the adequate protection, mitigation, and enhancement of fish and wildlife (including related spawning grounds and habitat); (4) irrigation; (5) flood control; (6) water supply; (7) recreation; and (8) other beneficial public uses. See 16 U.S.C. §§ 803(a), 797(e) (1988).⁸ Recent amendments to the Federal Power Act, the legislative history of those amendments,

⁸ FERC's regulations implementing Part I of the Federal Power Act also manifest the comprehensive nature of FERC's review of factors relevant to the development of a waterway. In 1981, largely in response to the National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321-4347 (1988), FERC amended the regulations that govern the contents of applications for hydroelectric projects. Among other things, the amended regulations require license applicants to prepare and submit to FERC several reports, including, a Report on Water Use and Quality, a Report on Fish, Wildlife and Botanical Resources, a Report on Historic and Archeological Resources, A Report on Socio-Economic Impact, a Report on Geological and Soil Resources, and a Report on Recreation Resources. See 18 C.F.R. 4.41(f), 4.51(f) (1993). FERC uses the information provided in these reports in its consideration of all relevant factors affecting the public interest in the development of the waterway.

and this Court's opinions all demonstrate that in creating this comprehensive hydroelectric licensing program Congress granted FERC the exclusive authority to establish conditions regulating stream flows for non-water quality matters, including minimum flows to protect fish habitat, such as those included in the State of Washington's Water Quality Certificate for the Elkhorn project.

In 1986, more than a decade after enacting the Clean Water Act, Congress enacted ECPA, which amended the Federal Power Act. The amendments that comprise ECPA ensure that nondevelopmental values, including fish and wildlife protection, recreational opportunities and energy conservation, are adequately considered by FERC in its determination of whether and under what conditions a hydroelectric license should be issued.

Amended section 4(e) of the Federal Power Act requires FERC, in determining whether to issue a license, to give "equal consideration" to power and various non-power values, including ". . . the protection, mitigation of damage to, and enhancement of fish and wildlife (including related spawning grounds and habitat)" See 16 U.S.C. § 797(e) (1988).⁹ This amendment pronounced the importance of FERC's consideration of non-developmental values, including the protection of fish and wildlife, in the hydroelectric licensing process.

⁹ The entire 1986 amendment to section 4(e) provides:

In deciding whether to issue any license under this Part for any project, the Commission, in addition to the power and development purposes for which licenses are issued, shall give equal consideration to the purposes of energy conservation, the protection, mitigation of damage to, and enhancement of, fish and wildlife (including related spawning grounds and habitat), the protection of recreational opportunities, and the preservation of other aspects of environmental quality.

Electric Consumers Protection Act of 1986 § 3(a) (1988), (codified as amended at 16 U.S.C. 797(e)).

ECPA also amended section 10(a) of the Federal Power Act by requiring that FERC's comprehensive planning process encompass non-developmental values, including the protection of fish and wildlife.¹⁰ As amended, section 10(a) requires FERC to weigh numerous factors that state water quality agencies are not required to consider under section 401 of the Clean Water Act, including regional power needs, water supply, recreation, and the effect of a project on fish habitat.

Additionally, section 10(j) of the Federal Power Act, as added by ECPA, explicitly reaffirms FERC's role as the ultimate decision-maker regarding fish and wildlife related concerns in the issuance of hydropower licenses. Section 10(j) provides that to "protect, mitigate damages to, and enhance, fish and wildlife (including related spawning grounds and habitat)" affected by the project, each license shall contain conditions for such protection, mitigation and enhancement "based on recommendations received pursuant to the Fish and Wildlife Coordination Act . . . from the National Marine Fisheries Service,

¹⁰ Amended section 10(a) provides in relevant part:

(a) Modification of plans; factors considered to secure adaptability of project; recommendations for proposed terms and conditions

(1) That the project adopted, including the maps, plans, and specifications, shall be such as in the judgment of the Commission will be best adapted to a comprehensive plan for improving or developing a waterway or waterways for the use or benefit of interstate or foreign commerce, for the improvement and utilization of water-power development, for the adequate protection, mitigation, and enhancement of fish and wildlife (including related spawning grounds and habitat), and for other beneficial public uses, including irrigation, flood control, water supply, and recreational and other purposes referred to in section 797(e) of this title if necessary in order to secure such plan the Commission shall have authority to require the modification of any project and of the plans and specifications of the project works before approval.

16 U.S.C. § 803(a)(1) (1988).

the United States Fish and Wildlife Service, and State fish and wildlife agencies." See 16 U.S.C. § 803(j)(1) (1988). While section 10(j) requires FERC to give special deference to recommendations made by state and federal fish and wildlife agencies regarding conditions appropriate for the protection, mitigation of damage to, and enhancement of fish and wildlife, FERC is not required to include such recommended conditions in the license. If, after affording the recommendations of fish and wildlife agencies due deference and considering relevant developmental and non-developmental values, FERC determines that such recommendations are inconsistent with the purposes and requirements of the Federal Power Act or other applicable law, section 10(j) explicitly grants FERC the authority to reject such recommendations. See 16 U.S.C. § 803(j)(2) (1988).¹¹

¹¹ Section 10(j) provides:

(j) Fish and wildlife protection, mitigation and enhancement; consideration of recommendations; findings

(1) That in order to adequately and equitably protect, mitigate damages to, and enhance, fish and wildlife (including related spawning grounds and habitat) affected by the development, operation, and management of the project, each license issued under this subchapter shall include conditions for such protection, mitigation, and enhancement. Subject to paragraph (2), such conditions shall be based on recommendations received pursuant to the Fish and Wildlife Coordination Act (16 U.S.C. 661 et seq.) [16 U.S.C.A. § 661 et seq.] from the National Marine Fisheries Services, the United States Fish and Wildlife Service, and State fish and wildlife agencies.

(2) Whenever the Commission believes that any recommendation referred to in paragraph (1) may be inconsistent with the purposes and requirements of this subchapter or other applicable law, the Commission and the agencies referred to in paragraph (1) shall attempt to resolve any such inconsistency, giving due weight to the recommendations, expertise, and statutory responsibilities of such agencies. If, after such attempt, the Commission does not adopt in whole or in part a recommendation of any such agency, the Com-

The legislative history of ECPA confirms Congress' intention that FERC have ultimate authority to establish conditions requiring minimum stream flows for non-water quality related matters, including the protection of fish habitat. During the debates leading to the enactment of ECPA, the states sought to include a provision in the Federal Power Act that would have granted the states control over the appropriation, diversion, and use of water by licensed projects. Immediately prior to Senate passage of the Senate version of ECPA, Senator Baucus inserted into the record a position paper advocating such an amendment. Senator Baucus ultimately agreed not to offer amendments to the Senate version of ECPA that would grant this authority in exchange for an agreement from Senator McClure, Chairman of the Senate Committee on Energy and Natural Resources, to hold a Congressional hearing on the subject. *See* 99 Cong. Rec. S4448-49 (April 17, 1986). Although Senator McClure's committee conducted the hearing on September 12, 1986, no amendments regarding the grant of additional water use authority to the states were made to ECPA, either in conference or by the House or Senate. Instead, Congress reaffirmed FERC's exclusive authority over water use matters associated with licensed projects when it amended the Federal Power Act to include section 10(j). 16 U.S.C. § 803(j) (1988).

The conference report on ECPA demonstrates that ECPA did increase the states' role in determining fish

mission shall publish each of the following findings (together with a statement of the basis for each of the findings):

(A) A finding that adoption of such recommendation is inconsistent with the purposes and requirements of this subchapter or with other applicable provisions of law.

(B) A finding that the conditions selected by the Commission comply with the requirements of paragraph (1).

Subsection (i) of this section shall not apply to the conditions required under this subsection.

16 U.S.C. § 803(j).

and wildlife conditions in hydroelectric licenses, including minimum stream flow requirements, by directing FERC to give special deference to state fish and wildlife recommendations. Specifically, the conference report recognized that, "[t]he new section 10(j), which stems from the House amendment to S. 426, clearly and unmistakably upgrades the status of recommendations of the National Marine Fisheries Service, the U.S. Fish and Wildlife Service, and the State fish and wildlife agencies made pursuant to the Fish and Wildlife Coordination Act." *See* H.R. Conf. Rep. No. 934, 99th Cong., 2d Sess. 21, 23 (1986), reprinted in 1986 U.S.C.C.A.N. 2537, 2539. Increasing the states' authority in this way would have been unnecessary if Congress had previously granted the states authority in section 401 of the Clean Water Act to impose conditions regarding fish and wildlife, including minimum flows to protect fish habitat, at FERC licensed projects.

The states' limited role in determining fish and wildlife conditions in licenses is further demonstrated by other statements in the legislative history of ECPA that describe Congress' grant of authority to FERC to determine fish and wildlife conditions. In its description of section 10(j), the Committee of Conference stated:

... while new section 10(j) certainly upgrades statutorily the importance and status of fish and wildlife recommendations under the Fish and Wildlife Coordination Act, they are still recognized as "recommendations," not mandatory requirements as provided in section 30(c) of the Federal Power Act for exemptions under the Act.

H.R. Conf. Rep. No. 934, 99th Cong. 2d Sess. 21, 25 (1986), reprinted in 1986 U.S.C.C.A.N. 2537, 2541. Senator McClure, Chairman of the Senate Committee on Energy and Natural Resources and Chairman of the Committee of Conference, also echoed the statements of the Committee of Conference immediately before the Senate passed ECPA:

When we considered this legislation in the Senate, we sought to ensure that fish and wildlife considerations were fully and deliberately reviewed by FERC in setting conditions on a license. The House had the same concern. Neither body considered giving the fish and wildlife agencies the same type of mandatory conditioning authority which they have under section 30(c) for exemptions. Neither did either body want in any way to interfere with the role of FERC in balancing competing values.

See 99 Cong. Rec. S15384 (October 6, 1986).¹²

This Court has also acknowledged FERC's preemptive authority to determine license conditions relating to non-water quality related matters, including fish and wildlife. Forty-seven years ago, the Court first recognized that the exclusive nature of the federal hydroelectric licensing process preempts conflicting state action. In *First Iowa Hydro-Electric Coop. v. FPC*, 328 U.S. 152 (1946), the Court rejected the State of Iowa's efforts to impose a state permitting requirement on an applicant for a hydroelectric

¹² Section 30 of the Federal Power Act governs exemptions from the requirements of the Act for conduit hydroelectric facilities. Pursuant to section 30(c) of the Federal Power Act, FERC, in determining whether an exemption is appropriate, must consult with the United States Fish and Wildlife Service and the relevant state fish and wildlife agency in the manner provided in the Fish and Wildlife Coordination Act and *must* include in any exemption, terms and conditions that the United States Fish and Wildlife Service and the relevant state agency believe are appropriate to prevent loss of, or damage to, fish and wildlife resources. See 16 U.S.C. § 823a(c) (1985). Section 30(c) of the Federal Power Act therefore grants the states authority to impose conditions relating to fish and wildlife in certain limited circumstances. The Committee's and Senator McClure's recognition of the extraordinary authority granted state fish and wildlife agencies in Section 30(c) and their express acknowledgement that Congress did not intend for state fish and wildlife agencies to have such mandatory conditioning authority in the normal licensing process, further demonstrate Congress' intention that FERC have exclusive authority to determine conditions relating to fish and wildlife in hydroelectric licenses.

license from the Federal Power Commission. The Court concluded that allowing the state to impose a permitting requirement would in effect grant the state veto power over the license and thereby subvert Congress' intention to concentrate comprehensive hydropower planning authority in the Federal Power Commission. *First Iowa*, 328 U.S. at 164.

More recently, this Court considered the State of California's authority to impose minimum flow requirements at hydroelectric projects to protect fisheries in *California v. FERC*, 495 U.S. 490 (1990). In that action, California argued that section 27 of the Federal Power Act, which reserves certain authority regarding proprietary water rights to the states, provided the state with authority to impose mandatory stream flow requirements for fish and wildlife. This Court rejected California's contention and unanimously held that the stream flow requirements mandated by California were preempted by the federal licensing program. In making that determination, this Court specifically recognized that the addition of section 10(j) to the Federal Power Act reaffirmed "*First Iowa's* understanding that the FPA establishes a broad and paramount regulatory role." See *California v. FERC*, 495 U.S. at 499.

In this proceeding, as a condition in the section 401 certificate to PUD No. 1 of Jefferson County and the City of Tacoma, the Washington Department of Ecology has imposed minimum stream flow requirements for the Elkhorn project based upon recommendations made by State fish and wildlife agencies pursuant to statutes that are unrelated to the State's water quality criteria adopted under the Clean Water Act. The Washington Supreme Court upheld the State agency's decision, in part, by concluding that the phrase "any other appropriate requirement of State law" in section 401(d) is not confined to state water quality standards. *Washington Dep't of Ecology v.*

PUD No. 1, 849 P.2d 646, 653 (Wash. 1993). The court found the quoted phrase to be "a congressional authorization to the states to consider all state action related to water quality in imposing conditions on section 401 certificates." *Id.* The state actions the Washington court references would include the establishment of flows to provide for "preservation of wildlife, fish, scenic, aesthetic and other environmental values, and navigational values," Wash. Rev. Code § 90.54.020(3)(a) (1991), which are the very matters that Congress has determined to be in the exclusive purview of FERC. Because FERC has taken the position that it must accept the terms of the 401 water quality certificate as a part of the license,¹³ the inclusion of the conditions in the section 401 certificate makes such conditions mandatory on the Elkhorn project. As a result, the Washington Supreme Court's interpretation of section 401 eviscerates FERC's authority to consider other stream flow recommendations for fish habitat at the Elkhorn project pursuant to section 10(j) of the Federal Power Act and to balance competing uses of the water resource as mandated by section 10(a) of the Federal Power Act.

If the State of Washington had attempted to impose the prescribed minimum flow requirements or other similar conditions on the Elkhorn project under any State statute independent of the Clean Water Act, the State's action would directly conflict with the authority granted FERC under the Federal Power Act as reaffirmed by this Court in *First Iowa* and *California v. FERC*. The Washington Supreme Court's decision nevertheless interprets section 401(d) to provide states with the very authority to mandate license conditions that states could not otherwise exercise. This illogical interpretation of

¹³ See *Town of Summersville*, 60 F.E.R.C. ¶ 61,291 at 61,990 (1992); *Noah Corp.*, 57 F.E.R.C. ¶ 61,170 at 61,601 (1991); *Central Maine Power Co.*, 52 F.E.R.C. ¶ 61,033 at 61,172-73 (1990).

the authority granted the states under section 401 of the Clean Water Act ignores Congress' express acknowledgement of the comprehensive licensing process established under the Federal Power Act and this Court's explicit recognition of FERC's paramount role in the area of hydroelectric licensing, including fish and wildlife regulation, at federally licensed hydroelectric facilities.

B. The Washington Department Of Ecology Exceeded The Authority Granted To The States In The Clean Water Act.

The statutory language and legislative history of section 401 of the Clean Water Act demonstrate that Congress granted the states a narrower, more limited authority to participate in the federal licensing process than that found by the Supreme Court of Washington. Rather than repeat the entire argument made by the Petitioners regarding the State of Washington's failure to act within the parameters of the limited authority granted to it under section 401 of the Clean Water Act, *amici* will summarize several points addressed in more detail by Petitioners.

The Clean Water Act was enacted to regulate discharges into the nation's waters, particularly discharges involving the addition of pollutants into those waters. Within this context, section 401 specifically grants states the limited authority to certify that federally licensed projects will comply with applicable water quality standards and related criteria concerning discharges that are specified in section 401. Section 401(d) further provides that states may condition water quality certificates to ensure compliance with these requirements and "other appropriate requirements of State law" concerning activities that may result in discharges. As demonstrated in Petitioners' Brief, section 401 only grants state water quality agencies the authority to address the effect on water quality of discharges from federally licensed activities. This narrow grant of authority to the states was

not intended to intrude on the other areas of responsibility not involving water quality that Congress reserved to federal licensing and permitting agencies.

In this case, as a condition in the water quality certificate, the Washington Department of Ecology sought to impose—through its water quality certificate—month-by-month stream flow requirements for fish habitat that the state concedes are not required for water quality. Washington's published water quality criteria pertain to such matters as fecal coliform, dissolved oxygen, dissolved gases, and other water quality characteristics. By failing to limit the section 401 conditions to requirements designed to ensure that the project would comply with these water quality criteria, the State exceeded the limited authority that Congress granted it under section 401.

II. THE FERC HYDROPOWER LICENSING PROCESS WILL BE EFFECTIVELY PARALYZED, AND THE NATION'S HYDROELECTRIC PROJECTS WILL BE SEVERELY AFFECTED IF STATES ARE ALLOWED TO IMPOSE MINIMUM FLOW CONDITIONS FOR FISH HABITAT AND OTHER NON-WATER QUALITY CONDITIONS THROUGH SECTION 401 CERTIFICATIONS.

The Washington Supreme Court's overbroad interpretation of the authority granted the states in section 401 of the Clean Water Act directly interferes with the hydroelectric licensing process established in the Federal Power Act. According to FERC's own records, between the years 1993 and 2010, FERC must relicense 416 hydroelectric projects with a total power capacity of 26,202 megawatts, enough power to serve more than eight million people each year.¹⁴ These figures do not reflect applications for new hydroelectric power projects.

¹⁴ Edison Electric Inst., *Statistical Yearbook of the Electric Utility Industry/1991*, No. 59, Table Table 1, p. 7 (Total U.S. 1991 generating capacity) and Table 8, p. 14 (Estimated total U.S. 1991 population).

Conditions requiring minimum stream flows are of primary importance to these federal hydroelectric licenses. Stream flows affect not only power production but also project economics, project viability, recreation, navigation, fish and wildlife habitat, and many other concerns that FERC, but not a state water quality agency, must consider under the Federal Power Act. Because FERC has taken the position that it is constrained from modifying section 401 conditions imposed by the states, FERC, faced with overbroad section 401 conditions, cannot adequately perform its licensing responsibilities under the Federal Power Act. In fact, FERC may not be able to issue a license for a particular project at all if the state, by imposing improper section 401 conditions, makes the project economically unfeasible. Under the Washington Supreme Court's decision, a state water resource agency that has no obligation to consider the impact of its decision on energy production and the other benefits of hydroelectric projects can now decide the fate of hydroelectric projects instead of FERC, the agency to which Congress delegated authority to make those decisions.

If states are allowed to mandate minimum stream flows for non-water quality related matters such as fish habitat under the guise of the Clean Water Act, without appropriate balancing assessments made by FERC, hydropower and the many benefits that it provides to consumers, communities, and the nation will be severely affected. An increase in minimum flows at a hydroelectric project—in this case, for fish habitat—results either in lost energy production (because water is not diverted to power generation facilities) or in the production of energy when it is uneconomic or not needed. In either case, the lost hydropower must be replaced. To replace the lost power, electric suppliers must turn to other forms of production, particularly fossil fueled generation with consequent adverse implications for air quality, cost, diversity of the nation's energy supply, and other interstate

interests. In addition, increased minimum flows can adversely affect other beneficial uses of the waterway, including recreation and water supply.

For all of these reasons, Congress intended for the regulation of hydropower to have a comprehensive and national focus. When analyzing all of the competing interests that pertain to a hydroelectric project, FERC cannot and does not consider only localized concerns. River systems are not confined by state borders. Indeed, many state borders are defined by rivers, and many of the nation's largest rivers cross between or through multiple states. As a result, many hydroelectric projects affect water resources in more than one state.¹⁵ Recognizing this reality, FERC maintains a data base of hydroelectric projects by river basin in order to consider the impacts that a hydroelectric project may have on an entire river basin.¹⁶ For example, FERC may impose conditions in a license in order to facilitate fish migration from one state

¹⁵ See Map of Hydroelectric Plants Under FERC License For All Projects Having Total Potential Capacity of 15,000 Kilowatts Or More (As of Jan. 1, 1984), which is attached in the Appendix. (A. 3a).

¹⁶ When multiple projects in a river basin may have "cumulative" effects on the resources of the basin, FERC evaluates those effects as part of its environmental review when licensing the projects. For example, in 1989 FERC licensed a number of proposed new hydroelectric projects at existing dams on the upper Ohio River basin. *Allegheny Electric Coop.*, 48 F.E.R.C. ¶ 61,363 (1989). Because the FERC staff determined that the projects might have significant cumulative impacts on the basin, an environmental impact statement ("EIS") was prepared for the projects. After further input, the FERC staff issued a 600-page final EIS analyzing both cumulative and site-specific impacts on environmental resources, including water quality, fisheries, and recreation. As the D.C. Circuit noted in approving FERC's actions, the final EIS "analyzed the proposed projects from a number of different perspectives, including power generation, impact on water quality and fishery resources, effects on recreational facilities, and socio-economic conditions." *United States Dep't of Interior v. FERC*, 952 F.2d 538, 540 (D.C. Cir. 1992).

to another state for spawning. Alternatively, a dam located on a river may provide lake recreation or water for a municipality upstream of the dam, while releasing water through the dam for fish habitat downstream. The upstream and downstream locations may be in two different states, but the amount of flow for fish habitat will affect the water available for municipal purposes and lake levels at the community upstream. These considerations require the oversight of FERC, an agency with the mandate and responsibility to consider the consequences of flow conditions across state lines.

Because of the large number of hydroelectric projects that must be licensed or relicensed, and the prospect that each of the 48 states that presently has, or is proposed to have, a FERC licensed project within its borders will interpret section 401 differently in licensing proceedings, the potential for litigation and administrative delays to resolve section 401 disputes is enormous. By appropriately defining the limitations on the authority granted state water quality agencies under section 401 of the Clean Water Act, this Court can prevent disruption in the federal licensing process established by Congress in the Federal Power Act, while fully honoring the provisions of both statutes. An appropriate definition of the authority granted to the states in section 401 will allow state and federal agencies to perform their intended roles in implementing the Federal Power Act and the Clean Water Act, thereby ensuring FERC's ability to license projects in a way that safeguards the overall public interest and protects the viability of the nation's hydropower resources.

CONCLUSION

For the foregoing reasons, the decision of the Supreme Court of Washington should be reversed.

Respectfully submitted,

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APPENDIX

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1. *American Forest & Paper Association*

American Forest & Paper Association ("AFPA") is the national trade association of the forest, pulp, paper, paperboard, and wood products industry, which as a group is the third largest producer of electricity among manufacturers in the United States and is one of the nation's leaders in the development and use of hydroelectric power. AFPA represents approximately 550 member companies and related trade associations (whose memberships are in the thousands), which grow, harvest and process wood and wood fiber, manufacture pulp, paper and paperboard products from both virgin and recovered fiber, and produce solid wood products. As a single national trade association, AFPA represents an industry that accounts for over 7 percent of the total United States manufacturing output and 90 percent of domestic recycled paper manufacturing capacity.

2. *American Public Power Association*

American Public Power Association ("APPA") is the national organization representing 1,750 of the nation's 2,000 local public power systems. These systems are located in every state except Hawaii and range in size from the largest public power system, the Los Angeles Department of Water and Power with more than 1.3 million customers, to small towns with fewer than 100 customers. Public power systems own approximately 11.9 percent of the total installed electric utility generating capacity in the United States. Hydroelectric projects, with a total installed capacity of 18,426,063 kilowatts, comprise nearly 21 percent of public power's total generation. There are 90 APPA member utilities with hydroelectric capacity. Certain of these utilities, such as the New York Power Authority and the South Carolina Pub-

lic Service Authority, market this hydroelectric power at wholesale to other publicly owned utilities.

3. *Edison Electric Institute*

Edison Electric Institute ("EEI") is the association of the nation's investor-owned electric utility companies.¹ Its members serve 97 percent of the customers of the investor-owned segment of the industry and 73 percent of all consumers of electricity in the United States. EEI's members generate 78 percent of all the electricity in the United States and service 76 percent of the nation's ultimate customers. A large number of EEI's members rely, either directly or through power purchase agreements, upon hydroelectric power to supply their customers' needs and to operate their systems. Over the last eighty years, investor-owned utilities have developed, operated and maintained large numbers of hydroelectric projects, and today operate approximately 366 such projects under licenses issued by the Federal Power Commission or its successor, the Federal Energy Regulatory Commission. These projects serve over 100 million Americans in forty-one states. As the national representative of the single largest group of hydroelectric project licensees, EEI has a vital interest in ensuring that the federal statutes governing the licensing of hydroelectric projects are interpreted consistently and implemented properly.

4. *National Hydropower Association*

National Hydropower Association ("NHA") is the non-profit association established in 1983 to be a national voice for the hydropower industry. NHA has over 100 members from all segments of the hydroelectric industry, including investor-owned utilities, cooperatives, municipalities, private developers, manufacturers, engineers, and legal, financial and consulting firms from all regions of the country.

¹ Consumers Power Company, a member of EEI, does not join in this *amici* filing.

